IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHEILA SMITH, Plaintiff,	:	CIVIL ACTION
	:	NO. 97-1561
v.	:	
PATHMARK STORES, INC. f/k/a SUPERMARKETS GENERAL CORP. and WILLIAM GRECO, Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J. June 11, 1998

Plaintiff, Sheila Smith ("Smith"), filed the instant sexual harassment action against Defendants, Pathmark Stores, Inc. ("Pathmark") her employer, and her former supervisor William Greco ("Greco"). Defendants request summary judgment in their favor. Based on the following, Defendants' request is granted in part and denied in part.

I. Background[1]

In March of 1995, Smith, a long time employee of Pathmark, worked as a perishables clerk in the meat department of Pathmark's Willow Grove market where she was responsible for stocking and organizing the meat case. Greco, a recent Pathmark

[1] Neither party has presented the court with a comprehensive summation of the underlying facts, disputed or not. Additionally, the record is replete with conflicting evidence as to dates on which critical incidents occurred. Nonetheless, in an attempt to make some semblance of order and to properly review Defendants' motion I have gathered the following basic facts from exhibits attached to the parties' briefs and recite them in a light most favorable to Smith. See Bixler v. Central Pennsylvania Teamsters Health and Welfare Fund, 12 F.3d 1292, 1297 (3d Cir. 1993).

hire, became manager of the meat department and Smith's direct supervisor. From their initial encounter onward Smith and Greco did not see eye to eye. On his first day Greco directed Smith to reorganize the meat case. She questioned his judgment and refused to follow his orders. A shouting match followed. A few days after this altercation, on or about March 22 or 30, 1995, Smith and Greco met with assistant store manager Frank Merz ("Merz"). Merz advised Greco to acknowledge the value of Smith's input, as she had been with the company for over ten years, and directed Smith to follow Greco's orders. The two apologized and agreed to work together amicably. As they left the meeting Greco placed his arm around Smith's shoulder stating: "how about if the two of us just leave here and get naked and that would be water under the bridge." (Complaint, ¶ 5(b); Plaintiff's Exhibit B(2) - Smith's Deposition at 7-9; Defendants' Exhibit A - Smith's Workers' Compensation Complaint at 2; Defendants' Exhibit B - Smith's Workers' Compensation Hearing Transcripts at 14).

According to Smith, soon after this incident she was stopped by Merz who said "listen I just want you to work with Bill Greco, can you do that, show him the ropes." (Plaintiff's Exhibit B(2) - Smith's Deposition at 8). Smith took this opportunity to inform Merz of Greco's comments about "getting naked," to which Merz responded "Sheila [Smith], come on, he was just kidding." Smith then requested that Merz "tell him [Greco]

not to make his remarks, to keep his statements to himself and to keep his hands to himself." (Id.) According to Smith, Merz ignored her request. (Id.) Deposition testimony from Merz, which could confirm or refute Smith's account, has not been submitted by either party.

Sometime between May 11th and May 18th Greco approached Smith as she was leaned over the chicken case reorganizing stock, put his arm around her shoulders and began talking. As Smith stood up Greco's hand slid down her back and rested on her behind for about one minute. Smith moved away quickly. (Defendants' Exhibit B - Workers' Compensation Hearing Transcript at 21; Plaintiff's Exhibit B(2)- Smith's Deposition at 41-44; Defendants' Exhibit C - Pathmark Sexual Harassment Complaint Report).

Later on that same day, in front of her co-workers Greco shouted to Smith "You know what your problem is, your problem is you need a man." (Plaintiff's Exhibit B(2) - Smith's Deposition at 52). Smith testified, however, that she took this comment as jest.

> "Well it turned out to be a joke with the guys only because Bill Greco had commented right before he hollered you need a man that oh, that is right you worked with some better meat wrappers. And I said that's right. And he said who was it, Pat Sherry and Goldy. So it was made out to be a joke between the guys because these where old time meat wrappers who taught me what I know. . . . They were women." (Id.)

During this same time period Greco approached Smith while in the back of the meat department, informed her that he was getting divorced and asked Smith whether she lived alone. (Defendants' Exhibit B - Workers' Compensation Hearing Transcripts; Defendants' Exhibit A - Workers' Compensation Complaint at 2; Plaintiff's Exhibit B(2) - Smith's Deposition at 31).[2]

On May 15, 1995, Greco reassigned Smith from the meat case to the back of the department to do meat wrapping. It was implied that the switch was due to an ongoing problem -- expired meat was not being removed from the case. (Defendant's Exhibit D(1) - Smith's Deposition 59-65). Smith resisted the switch and Greco immediately called a meeting with Merz. (Id. at 59-60). During the meeting, in response to Merz's show of support for Greco's decision to remove Smith from the meat case, Smith "opened up" about Greco's harassment. (Id. at 62). After Smith's charges were relayed to the store supervisor, William DeGrasse ("DeGrasse") an investigation was conducted. Based on this investigation, management concluded that Greco had not acted inappropriately towards Smith, but, that the two were unable to work together. (Defendants' Exhibit C - Sexual Harassment Complaint Report). Thus, a decision was made to separate Smith

[2] Smith claims that a further incident of sexual harassment took place on April 1, 1995, however, provides no description of such event. (Complaint ¶5(b); Defendants' Exhibit A - Worker's Compensation Complaint ¶3)

and Greco. Smith was given the option of transferring to the deli department within the Willow Grove store or to the meat department of another Pathmark store in Bensalem, Pennsylvania. On May 25, 1995 Smith took disability leave for emotional and physical ailments she claimed to be suffering as a result of Greco's conduct. Prior to her departure, Smith decided that she would prefer to transfer to the Bensalem store. On her return, Smith began working in Bensalem where she continues to work. Smith suffered no loss in pay or position as a result of her transfer.

It appears from the record that soon after Smith's allegations, Greco was discharged. (Defendants' Reply Brief at 5). Internal investigations uncovered other questionable conduct. Two of Smith's female coworkers in Willow Grove had also been recipients of unwelcome comments from Greco. Greco offered Elen Klappa ("Klappa") "$200 for a blow job" and referred to Bonnie Penglase ("Penglase") as "the sexiest and prettiest girl in the store." (Plaintiff's Exhibit E - Klappa's Deposition at 12; Plaintiff's Exhibit F - Penglase's Deposition at 16).

Smith commenced this action by filing a complaint asserting claims for hostile work environment sexual harassment and retaliation in violation of Title VII, 42 U.S.C. §§ 2000e et seq. and the Pennsylvania Human Relations Act (PHRA), 43 Pa. Cons. Stat. Ann. §§ 951 et seq. (Counts I and III), for

intentional and negligent infliction of emotional distress (Count II) and for assault and battery (Count II). Discovery is complete and Pathmark now requests summary judgment in its favor as to all counts.

II. Summary Judgment

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the record, the court must presume that the non-moving party's version of any disputed fact is correct and must draw all reasonable inferences in favor of the non-moving party. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 456 (1992); Semper v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir. 1995). To successfully challenge a motion for summary judgment, the non-moving party must be able to produce evidence that "could be the basis for a jury finding in that party's favor." Kline v. First Western Government Securities, 24 F.3d 480, 485 (3d Cir. 1994).

III. Discussion

A. Counts I and III: Title VII and PHRA

Courts have uniformly interpreted the PHRA consistent with Title VII. See Clark v. Commonwealth of Pennsylvania, 885

F.Supp. 694, 714 (E.D.Pa. 1995); Brennan v. National Tel. Directory Corp., 881 F.Supp. 986, 994 n.5 (E.D.Pa. 1995); Doe v. Kohn, Nast & Graf, P.C., 862 F.Supp. 1310, 1323 (E.D.Pa. 1994). Smith alleges hostile work environment sexual harassment and retaliation under both statutes. See 42 U.S.C. § 2000e-2(a)(1), § 2000e-3(a); 43 Pa.Cons. Stat. Ann. §§ 955(a),(d). Thus, I analyze Smith's claims within the framework of Title VII, yet my conclusions, unless otherwise noted, apply equally to Smith's PHRA claims.

i. Greco's Liability

Defendants contend that Greco cannot be held individually liable under either Title VII or the PHRA. In Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir. 1996), the Third Circuit Court of Appeals in an en banc decision, joined the majority of other circuits in concluding "that Congress did not intend to hold individual employees liable under Title VII." Id. at 1077; see also Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996). Accordingly, Smith's Title VII claims against Greco are dismissed.

Like Title VII, § 955(a) of the PHRA establishes liability solely for employers. See Dici, 91 F.3d at 552. However, the PHRA goes further than Title VII to establish accomplice liability for individual employees who aid and abet a § 955(a) violation by their employer. See 43 Pa. Cons.Stat. Ann.

§ 955(e) (Purdon Supp. 1998) (providing liability for employees who "aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice"). Thus, several courts within this district have held that a supervisor, such as Greco, who fails to take action to prevent discrimination, even when it is his or her own conduct at issue, can be liable for aiding and abetting the employer under § 955. See Kohn v. Lemmon Company, 1998 WL 67540 *8 (E.D.Pa. Feb. 19,1998); Frye v. Robinson Alarm Co., 1998 WL 57519 at *4 (E.D.Pa. Feb. 11,1998) (citing Glickstein v. Neshaminy School Dist., 1997 WL 660636 at * 11-13 (E.D.Pa. Oct. 22, 1997)); Wien v. Sun Co., Inc., 1997 WL 772810, at *7 (E.D.Pa. Nov.21, 1997). It is undisputed, Greco was Smith's supervisor as well as Smith's alleged harasser. Therefore, he is subject to liability under the PHRA. Compare Dici, 915 F.3d at 552-052 ((non-supervisory employee's direct acts of discrimination do not trigger § 955(e) because the employee "cannot be said to 'intend' that his employer fail to respond.") (quoting Tyson v. CIGNA Corp., 918 F.Supp. 836, 841 (D.N.J. 1996)). Accordingly, Smith's PHRA claims against Greco remain.

ii. Hostile Work Environment

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's ... sex." 42 U.S.C. S 2000e-2(a)(1). The United States Supreme Court has concluded that a plaintiff may establish a Title VII violation if she can show that gender-based discrimination created a hostile or abusive working environment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

Our Court of Appeals has set forth a five part test for the district courts to apply in a hostile work environment case. Accordingly, a female Title VII plaintiff can successfully bring a gender-based discrimination claim against her employer only if she shows that (1) she suffered intentional discrimination on account of her gender; (2) the discrimination was pervasive and regular; (3) she was detrimentally affected by the discrimination; (4) the discrimination would detrimentally affect a reasonable woman in the plaintiff's position; and (5) the existence of respondeat superior liability. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

Defendants contend that Greco’s conduct fails to meet prong two of the Andrews test in that his actions were neither pervasive nor regular.

In determining the nature of a work environment for purposes of a hostile work environment claim, courts are not to examine the scenario on an incident-by-incident basis, but are instead to consider the totality of the circumstances. Andrews,

895 F.2d at 1484; Stair v. Lehigh Valley Carpenters Local 600, 813 F.Supp. 1116, 1119 (E.D.Pa. 1993). These circumstances may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). Conduct that is merely offensive, or which has the effect of making an employee's life at work merely unpleasant or uncomfortable, is without more, not actionable. Harris, 510 U.S. at 21-22. A plaintiff cannot rely upon casual, isolated, or sporadic incidents to support her claim of hostile work environment sexual harassment. See Andrews, 895 F.2d at 1482.

As described in more detail above, Smith's claim is based on the following four incidents: 1) Greco's comment to Smith "lets get naked" while placing his arm around her shoulder; 2) Greco's comment to Smith "you need a man"; 3) Greco's inquires as to whether Smith lived alone; and 4) Greco's touching of Smith's behind. These incidents occurred in a two month span and arguably may be characterized as frequent. More difficult is whether they can be characterized as severe. Unlike other cases involving hostile work environments, there is no evidence of offensive gesturing by Greco, extensive physical touching, Greco made no comments about Smith's physical anatomy, no threatening conduct, and no evidence has been presented indicating that Greco

either displayed pornography or sexual objects. See Andrews, 895 at 1486; Crumpton v. Runyon, 1998 WL 125547, *3 (E.D.Pa. March 19, 1998); Cooper-Nicholas v. City of Chester, 1997 WL 799443 *3 nn. 4-7 (E.D.Pa. Dec. 30, 1997) (citations omitted). Yet, I am mindful that the Andrews Court was careful to note that overt sexual harassment is not necessary to establish a sexually hostile environment and each individual incident need not be sufficiently severe to detrimentally affect a female employee. Andrews 895 F.2d at 1485. Accordingly I conclude that a fact finder could reasonably characterize Greco's conduct and comments towards Smith as pervasive and regular and thus Smith has established a genuine issue of material fact as to whether Greco created a hostile work environment.

Defendants go on to argue that, even if this court where to find that Smith was subjected to a hostile work environment, evidence of Pathmark's prompt remedial action renders Smith unable to establish respondeat superior liability, prong five of the Andrews test. Commonly, in the context of a sexual hostile environment claim an employer is liable for their "negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment." Bouton v. BMW of North America, Inc., 29 F.3d 103, 106 (3d Cir. 1994). Defendants note that immediately after Smith reported Greco's behavior to management on May 15, 1995, an investigation was undertaken the

upshot of which was a recommendation that Smith and Greco be separated. This recommendation was implemented when Smith transferred to the Bensalem store. Thus, Defendants contend that steps "reasonably calculated to prevent further harassment" were taken and therefore they should be relieved of liability. See Knabe v. Boury Corp., 114 F.3d 407, 413-414 (3d Cir. 1997)(citations omitted).

If May 15, 1995 was the first date on which Pathmark became aware of Greco's actions, I would be inclined to agree, however, Smith submits, with evidentiary support, that Pathmark failed to respond to her earlier reports regarding Greco's conduct. Her initial report to Merz immediately after Greco's "let's get naked" comment constitutes actual notice that she was being subjected to sexual harassment and, therefore, Defendants' failure to take prompt remedial action based on this notice is evidence of Defendants' negligence. The adequacy and effectiveness of this notice is for a jury to determine, as it is not readily apparent from the record before me. Thus, I find that Smith has established a material issue of fact as to whether Pathmark, as Smith's employer, is responsible for Greco's offensive conduct. Accordingly, Defendants' motion for summary

judgment on Smith's claims of sexual harassment in Counts I and II of her complaint are denied.[3]

ii. Retaliation

Smith alleges retaliation under Title VII and the PHRA. She claims that in retaliation for reporting Greco's inappropriate behavior to upper management on May 15, 1995, she was transferred to the Bensalem store and that no disciplinary action was taken against Greco. She also claims that Greco's decision on May 15, 1995 to relieve her of her duties working on the meat case and to reassign her to work in the back of the meat department to do meat wrapping was in retaliation for her rejection of his unwanted advances. (Plaintiff's brief at 3, ¶ 10).

Plaintiff bears the burden of establishing a prima facie case of retaliation. The burden then shifts to defendants to articulate a legitimate nondiscriminatory reason for the challenged action. If the defendants make that articulation the burden shifts back to the plaintiff to prove that the defendants

[3] I reach this decision, in part, due to apparent and important gaps in the record. Despite seeking a order to compel Greco's deposition neither party has submitted deposition testimony from Greco in support of or against Pathmark's motion for summary judgment. It is not readily apparent from the record that Greco's deposition was in fact ever taken -- which is highly unusual given the fact that he is the accused perpetrator. Additionally, testimony from another key witness, Frank Merz, the allegedly negligent supervisor, is also absent.

proffered reason is pretextual. To establish the prima facie case a plaintiff must demonstrate that 1) she engaged in protected activity; 2) the employer took adverse action; and 3) there was a causal connection between her participation in the protected activity and the adverse employment action.[4] Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995).

Neither party disputes that prong one has been satisfied, Smith engaged in protected activity when she reported Greco's alleged harassment on May 15, 1995. As to prong two, retaliatory conduct is proscribed by Title VII only if it alters the employee's compensation, terms, conditions, or privileges of employment, deprives him of her of employment opportunities or adversely affects his or her status as an employee. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). It follows that not everything that makes an employee unhappy qualifies as retaliation. Id at 1300. Pathmark contends that Smith's transfer was simply managements way of resolving personality conflicts between the two. Through the investigation of Smith's sexual harassment charges, Pathmark investigator,

[4] Title VII makes it unlawful for an employer to discriminate against an employee "because [the employee] has opposed any practice made an unlawful practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). The PHRA includes in its list of unlawful discriminatory practices "For any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has made a charge, testified or assisted in any manner, in any investigation, proceeding or hearing under this act." 43 P.S. § 955(d).

Steve Radcliff, determined that there was "bad blood" between Greco and Smith and recommended that Sheila should be transferred. (Defendants' Exhibit C - Sexual Harassment Complaint Report). Furthermore, Pathmark notes that Smith was offered the same position in the deli department of the Willow Grove store, but turned it down, that her job in Bensalem is actually closer to her home and that as a result of her transfer Smith has suffered no loss in pay or status within Pathmark.

Although, it is clear from the record that Smith's transfer did not involve a decrease in pay or status, our court of appeals has noted that a transfer even without loss of pay or benefits may, in some circumstances, constitute an adverse job action. Torre v. Casio Inc., 42 F.3d 825, 831 n.7 (3d Cir. 1994)(citing Collins v. State of Illinois, 830 F.2d 692, 702 n.7 (7th Cir. 1987)(collecting cases)). Circumstances may range from moving an employee's office to an undesirable location, transferring an employee to an isolated corner of the workplace, requiring an employee to relocate her personal files while forbidding her to use company stationary, and, as the Court in Torre noted, transferring an employee to a "dead -end" job.

Such attendant circumstances are absent in the instant case. Smith admits that the transfer itself did not bother her and that she had been transferred several times in her career with Pathmark. Upsetting was the fact that she felt management

had overlooked her loyalty to the company and instead sided with Greco, a recent hire, when they failed to discipline him based on Smith's complaints about his behavior. Smith testified "In all honesty . . . I didn't care about the transfer. I mean, I have been moved many times. There wasn't a problem with going to another store. It was the reason behind it that upset me. . . . I would have liked for them to treat me with respect being that I had so many years. . . ." (Defendant's Exhibit B - Smith's Deposition at 30). Smith went on to note that had management at least formally reprimanded Greco she would not have been troubled by the outcome. (Id. at 31). Thus, the crux of Smith's dissatisfaction stems not from managements treatment of her, but rather management's treatment of Greco. That Pathmark's allegedly lenient treatment of Greco offended Smith cannot form the basis of a retaliation claim as it does not constitute an adverse job action.

Furthermore, I am unpersuaded by Smith's argument that Greco's decision to switch her from working on the meat case to a meat wrapper was retaliatory. The facts indicate that this decision was never put into effect. As soon as Greco announced the switch, Smith made known her opposition and the May 15, 1995 meeting with Merz ensued. The outcome of this meeting was that Smith departed on disability leave and upon her return began working in the Bensalem store. Compare Ferguson v. E.I. duPont

de Nemours and Company, Inc., 560 F.Supp. 1172, 1200 (D. Del. 1983)(temporary transfer not an adverse employment action, although permanent transfer may be).

Accordingly, I grant summary judgment in favor of Defendants on Smith's claims of retaliation in Counts I and III of her complaint.

B. Count II

Count II of Smith's complaint contains state law claims of assault and battery and intentional and negligent infliction of emotional distress.

i. Pathmark's Liability

Smith claims that her employer Pathmark is liable for Greco's conduct which constituted assault, battery and intentional and negligent infliction of emotional distress under the theory of respondeat superior. Before analyzing the merits of these claims, I consider the issue of Pathmark's liability. For purposes of this inquiry only, I assume that Greco's actions constituted both an assault and battery on Smith and amounted to intentional and negligent infliction of emotional distress.

Respondeat superior provides that an employer is liable for the acts of its employee when those acts are committed during the course of and within the scope of that employee's employment. Fitzgerald v. McCutcheon, 410 A.2d 1270 (Pa. Super. 1979) Conduct of an employee is within the scope of employment if it is of a

kind and nature that the employee is employed to perform; it occurs substantially within the authorized time and space limits; it is actuated, at least in part, by a purpose to serve the employer, and if force is intentionally used by the employee against another, it is not unexpected by the employer. Natt v. Labar, 543 A.2d 223, 225 (Pa. Commw. 1988). Where, however, the employee commits an act encompassing the use of force which is excessive and so dangerous as to be totally without responsibility or reason, the employer is not responsible as a matter of law. If an assault is committed for personal reasons or in an outrageous manner, it is not actuated by the intent of performing the business of the employer and is not done within the scope of employment. Fitzgerald, 410 A.2d at 1272.

All conduct complained of by Smith occurred within the confines of Pathmark, therefore I am left to determine whether such conduct occurred as a function of Greco's duties to Pathmark. I easily reach the conclusion that Greco's comments about his marital status, his touching of Smith's shoulders and behind as she leaned over the chicken case, and his comment that Smith needed a man were not related to his proscribed duties as a meat manager for Pathmark. More troublesome is his comment "let's get naked" while he rested his arm on Smith's shoulder. These acts appear to have been ill attempts at reconciliation after both Smith and Greco were directed by Merz to improve their

working relationship. As a result of this direction it is conceivable that Pathmark expected Greco to make some token of reasonable reconciliation. Had Greco simply put his arm around Smith's shoulders, this gesture would fall within the purview of actions taken on behalf of the employer. However, by accompanying this gesture with a the comment "let's get naked" I find that Greco took his conduct out of the realm of that which is performed within the course of employment. Based on the fact Pathmark swiftly initiated an investigation when Smith informed them of Greco's actions on May 15, 1995 and that the company had formal sexual harassment grievance procedures in place, it is highly unlikely that they would condone such comments as a proper means of implementing Merz's directive. Accordingly, I find that because none of Greco's conduct was performed in the course of his employment, defendant Pathmark, his employer is not liable to Smith on her claims of assault and battery and intentional and negligent infliction of emotional distress.

ii. State Law Claims

a. Assault and Battery

Under Pennsylvania law, an assault occurs when one acts with the unprivileged intent to put another in reasonable and immediate apprehension of a harmful or offensive conduct and does in fact cause such apprehension. Stilley v. University of Pittsburgh, 968 F.Supp. 252, 259 (W.D.Pa. 1996) (quoting

Proudfoot v. Williams, 803 F.Supp. 1048, 1054 (E.D.Pa. 1992). Likewise, "the elements of the tort of battery are a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." Moser v. Bascelli, 865 F.Supp. 249, 252 (E.D.Pa. 1994) (quoting Levenson v. Souser,557 A.2d 1081, 1088 (Pa.Super. 1989)).

The record reveals at least two instances of unconsented touching at least on of which can easily be characterized as offensive. At the end of March Greco placed his arm around Smith's shoulder and in May Greco let his hand slip down on to Smith's behind. Without other witnesses or testimony from Greco, I find that Smith's account of these events establishes that a genuine issue of fact exists as to whether or not Greco committed battery. Likewise, the fact that Smith's testimony gives the impression that prior to such touchings she was apprehensive leads me to conclude that she has also established a genuine issue of material fact as to whether or not Greco's conduct constituted assault. (Plaintiff's Exhibit B(1) - Smith's Deposition at 9; Plaintiff's Exhibit B(2)- Smith's Deposition at 45). According, Smith's assault and battery claims against Greco survive summary judgment.

b. Intentional Infliction of Emotional Distress

The Supreme Court of Pennsylvania has not explicitly recognized the tort of intentional infliction of emotion distress. However, lower Pennsylvania courts have allowed plaintiffs to proceed "where the conduct in question is so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Rinehimer v. Luzerne Co. Comm. College, 539 A.2d 1298, 1305 (Pa.Super. 1988). The Third Circuit has observed that "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." Andrews, 895 F.2d at 1487 (quoting Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988)). "[T]he only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee." Id. (quoting Cox, 861 F.2d at 395-96). The incidents described by Smith are objectionable but far from outrageous and given my conclusion that neither Pathmark nor Greco retaliated against Smith, I find that Smith has failed to meet the high standards of an intentional infliction of emotional distress claim and accordingly dismiss the claim.

c. Negligent Infliction of Emotional Distress

Pennsylvania courts allow claims for negligent infliction of emotional distress under the following sets of circumstances. The first and most common situation is the "bystander" case in which the plaintiff actually observes the defendant injure a close relative. Sinn v. Burd, 404 A.2d 672 (Pa. 1979). Second, situations in which the defendant owes a plaintiff a pre-existing duty of care, either through contract or a fiduciary duty. Crivellaro v. Pennsylvania Power & Light, 491 A.2d 207 (Pa.Super. 1985). Finally, the court in Brown v. Philadelphia College of Osteopathic Medicine, 674 A.2d 1130 (Pa. Super. 1996), identified a third way to sustain a claim for negligent infliction of emotional distress, the impact rule. The impact rule has been stated as follows:

> "[W]here the plaintiff. . .sustains bodily injury, even though trivial or minor in character, which are accompanied by fright or mental suffering directly traceable to the peril in which the defendant's negligence placed the plaintiff, then mental suffering is a legitimate element of damages."
> Id.

Smith did not observe an emotionally distressing incident as a bystander and Greco owed no preexisting duty to her, therefore, the impact rule appears to be Smith's only avenue for recovery. Yet, because applicability of this rule in Pennsylvania courts is presently in a state of flux, I reserve judgment on the validity of this claim until both parties have been given further opportunity to flesh out their positions

either before or during trial. Accordingly, Smith's negligent infliction of emotional distress claim against Greco survives summary judgment.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHEILA SMITH, Plaintiff,	:	CIVIL ACTION
	:	NO. 97-1561
v.	:	
PATHMARK STORES, INC. f/k/a SUPERMARKETS GENERAL CORP. and WILLIAM GRECO, Defendants.	:	

O R D E R

AND NOW, this 11th day of June, 1998, upon consideration of Defendants' motion for summary judgment (Docket No. 20); Plaintiff's response (Docket No. 22); Defendants' reply (Docket No.23); and Plaintiff's sur-reply (Docket No. 24), it is hereby **ORDERED** that Defendants' motion is **DENIED** in part and **GRANTED** in part, as follows:

(1) Plaintiff's claims of retaliation are dismissed from Counts I and III of the complaint;

(2) Defendant, William Greco ("Greco") is dismissed as to Count I of the complaint;

(3) Defendant, Pathmark Stores, Inc. f/k/a Supermarkets General Corp. ("Pathmark"), is dismissed as to Count II of the complaint; and

(4) Plaintiff's intentional infliction of emotional distress claim contained in Count II of the complaint is dismissed.

Accordingly, the following claims and defendants remain:

(1) Plaintiff's hostile work environment claim under Title VII against Defendant, Pathmark;

(2) Plaintiff's hostile work environment claim under the PHRA against Defendants, Greco and Pathmark;

(3) Plaintiff's claims of assault, battery and negligent infliction of emotional distress against Defendant, Greco.

TRIAL in this matter is set for **Monday, August 17, 1998 at 9:30 a.m. in Courtroom 14A.**

BY THE COURT:

RONALD L. BUCKWALTER, J.